No. 08-1226

IN THE
SUPREME COURT OF THE UNITED STATES

LEONYER RICHARDSON,

Petitioner,

v.

STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, OFFICE OF POLICY AND MANAGEMENT, CYNTHIA WATTS ELDER, LEANNE APPLETON, LINDA YELMINI, DONALD BARDOT, and A. & R. EMPLOYEES UNION LOCAL 4200,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

STATE OF CONNECTICUT RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether an election of remedies provision in a collective bargaining agreement, that requires an employee with a state law claim of discrimination to choose between arbitration or the state civil rights agency and state court, violates the anti-retaliation section of Title VII?

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COUNTER-STATEMENT OF THE CASE

In this action the petitioner, Leonyer Richardson, asks this Court to review the Second Circuit Court of Appeals' decision affirming summary judgment for the Respondents, on the grounds that an election of remedies clause in a collective bargaining agreement does not violate the anti-retaliation provision in Title VII of the Civil Rights Act of 1964. The plaintiff fully litigated all of her claims in federal court and she lost on all counts.

Contrary to the petitioner's arguments, this case certainly does not involve an issue of profound national importance. The petitioner argues that as a result of the decision below by the Second Circuit Court of Appeals in this case, there is now a conflict between the Seventh Circuit Court of Appeals and the Second Circuit. This is simply not true. As the Second Circuit noted in its decision, the facts and the law in the present case are so different from those in the Seventh Circuit case, a different result was required.

Furthermore, this court has recognized the validity of choice of forum provisions in union agreements for resolving discrimination claims. Lastly, the district court's ruling on the merits, that the plaintiff was not discriminated or retaliated

against because she was dismissed for workplace misconduct, renders the relief sought in this Court to simply be an advisory opinion.

A. Factual Background

On page two of its decision below, the U.S. District Court found that "[e]xamination of the complaint, affidavits, pleadings, Rule 56(c) statements, and exhibits accompanying the motion for summary judgment, and the responses thereto, disclose the following undisputed material facts." (Respondent's Appendix p. 2, hereinafter App.) The facts found by the District Court include the following.

The plaintiff was employed by the defendant Commission on Human Rights and Opportunities (hereinafter CHRO) as a fiscal administrative officer beginning on October 6, 2000. (App., p. 3) Prior to that time, the plaintiff had been employed by two other state agencies, the first of which was the Department of Environmental Protection (DEP). Id. While at DEP, the plaintiff first met the defendant Cynthia Watts Elder, also an African American woman, who later became the Executive Director of CHRO. Id. Also while at DEP, the plaintiff was reprimanded for threatening her co-workers. Id. In November of 1997, on a recommendation from Watts-Elder, the plaintiff transferred from DEP to the defendant Office of Policy and Management (OPM) as a fiscal

administrative officer. Id. On May 30, 2000, the plaintiff filed a complaint with CHRO against OPM, alleging that her OPM supervisors were harassing her in various ways on the job. Id. Watts Elder then agreed to accept the plaintiff as a transfer employee from OPM to CHRO on October 6, 2000. Id. The defendant Leanne Appleton was assigned as the plaintiff's direct supervisor. Id. In Watts Elder's view, Appleton is a highly competent business manager. Id. Immediately upon her arrival at CHRO, the plaintiff began to exhibit misbehaviors similar to those at DEP and OPM, and on February 22, 2001, Appleton issued plaintiff a written warning for violating the security of the computer system. (App., p. 4) On April 6, 2001 Appleton issued plaintiff another written warning for several incidents of workplace misconduct. Id. On July 17, 2001, Appleton issued plaintiff a third written warning for failing to explain 52 untimely deposit slips and failure to follow state guidelines. (App., p. 6)

Watts Elder hired one Herbetia Williams, an African American woman, to investigate the plaintiff's alleged misconduct. (App., p. 6) Later in July of 2001, Ms. Williams submitted her report, finding that plaintiff had engaged in willful misconduct, that she had violated the Workplace Conduct Policy, and that plaintiff's behavior had created a hostile and chilling work environment. Id. In addition, Ms. Williams specifically found

that the plaintiff had exhibited the following misbehaviors: "screaming and slamming things; speaking to her supervisor in a loud voice; use of aggressive non-verbal communication; shaking her finger in Leanne's face; and constantly interrupting when others talk." Id. The plaintiff filed a complaint against CHRO with the CT Auditors of Public Accounts, challenging Ms. Williams' investigation and her qualifications, but the Auditors dismissed this complaint. (App., p. 8) Watts Elder suspended the plaintiff on August 6, 2001 for 10 days without pay based on her offensive and abusive conduct towards co-workers, theft, misuse of state funds, property and equipment. (App., p. 7)

On July 30, 2001, the plaintiff filed a CHRO complaint alleging that the actions taken by Appleton were discriminatory and retaliatory. Id. Said complaint was dismissed on March 15, 2002 on the grounds that "there is no reasonable possibility that further investigation will result in a finding of reasonable cause." Id.

As the Second Circuit Court of Appeals noted in its decision in this case, "Between July 30 and October 16, 2001, the conflict between Richardson and Appleton escalated both in intensity and breadth . . . Finally, on October 16, 2001 Watts Elder terminated Richardson's employment with the CHRO." (Petitioner's Appendix, Exhibit A, p. 6. Hereinafter Pet. App.)

Richardson then sought the assistance of her union (also a defendant in this case) in grieving her termination. Id. In addition, the plaintiff again amended her CHRO charge, alleging that Watts Elder had only terminated her for the purpose of retaliating against her. Id. Upon discovering that Richardson had filed a CHRO complaint regarding her termination, the union withdrew its appeal of her grievance (to arbitration), because Article 15 Section 10 of the Collective Bargaining Agreement (hereinafter CBA) provided that disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with [CHRO] arising from the same common nucleus of operative fact." (Pet. App. Exh. A p. 6-7) The plaintiff then filed yet another charge with CHRO on April 9, 2002 alleging that her union's refusal to seek arbitration constituted an independent act of retaliation. Id.

In its decision, the District Court found that shortly after the plaintiff was fired, she applied for unemployment benefits, which CHRO contested on the grounds that she was fired for misconduct. (App. p. 9) The issue of whether or not the plaintiff was fired for willful misconduct was brought before Connecticut's Employment Security Appeals Division by plaintiff's attorney. Hearings were held, and witnesses (including plaintiff) testified and were cross-examined. Id. The District Court noted that the Appeals Referee concluded as follows:

> the employer, Commission on Human Rights and Opportunities – State of Connecticut, discharged the claimant, Leonyer M. Richardson, for *deliberate misconduct which constituted willful misconduct* in the course of her employment. As a result, the claimant [Richardson] is disqualified from receiving unemployment compensation benefits . . ." (emphasis added.) (App. 9-10)

On Appeal, the Board of Review issued a 6 page decision which affirmed the Referee's ruling in full. (App., p. 10)

The District Court noted that many different fact finders had investigated the plaintiff's allegations and found them to be without merit (App. 14-15). The Court also noted another fact that was particularly troublesome:

> Particularly troublesome to Richardson's case is the fact that her several suspensions and job termination were at the behest of Watts-Elder, herself an African American woman, but more importantly, the same person who recommended Richardson to the OPM in 1997 and then facilitated Richardson's transfer to the CHRO in 2000. (App., p. 15)

The District Court also noted that the plaintiff filed a complaint with EEOC on September 6, 2001, (App., p. 7) and that the plaintiff filed this action in the U.S. District Court on April 18, 2002. (App. p. 10)

The Second Circuit Court of Appeals later found these facts to be important:

> Richardson remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf. (Pet. App. Exh. A, p. 20)

Since the plaintiff's rights to file with EEOC (which she did) and in federal court (which she did) were never impacted by her CBA, the Second Circuit concluded that her CBA "passes muster even under this formulation of the Gardner-Denver doctrine." (Pet. App. Exh. A, p. 20).

The District Court noted that plaintiff's union claimed that plaintiff failed to exhaust her administrative remedies under her union contract, and that plaintiff failed to respond to this claim:

> Moreover, the Union claims that Richardson did not exhaust her administrative remedies under the union

> contract. Richardson failed to respond to this claim. See Briones v. Runyon, 101 F.3d 287, 289, (2d Cir. 1996) ("Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion."). In particular, Richardson could have appealed the union's decision not to proceed to the representative assembly, or she could have pursued the grievance to arbitration as an individual. (Pet. App. Ex. C, p. 12 fn. 2)

In its two rulings, the District Court dismissed plaintiff's Title VII retaliation claims against the union, OPM, and CHRO, along with all of her other Title VII claims, state laws claims, and constitutional claims (including those against all of the individual defendants). (App., p. 15-28, and Pet. App. Ex. C, p. 10-16).

The District Court noted that recent U.S. Supreme Court cases (decided after Board of Governors) hold that the Federal Arbitration Act 'does not require parties to arbitrate when they have not agreed to do so.' EEOC v. Waffle House, 534 U.S. 279, 293 (2002)." (App. p. 24) Thus, the District Court held that the CBA election of remedies provision in the present case (Art. 15, Sec.10)
"does not violate the FAA." *Id.*

The Second Circuit Court of Appeals affirmed the District Court decision in all respects, noting that the plaintiff's broad allegations of retaliation were completely unsubstantiated by any evidence:

> Here, as the district court explained after thoroughly canvassing the record, "there is overwhelming evidence [that the CHRO terminated [*126] Richardson's employment due to her] insubordination and hostile behavior."
>
> On her retaliation claim against Appleton and Watts Elder, as with her retaliation claim against the union and the CHRO, [HN14] Richardson can survive summary judgment if she can show that an issue of fact exists as to whether "a retaliatory motive *played a part* in the adverse employment actions even if it was not the sole [**29] cause." *Summer v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)* (emphasis added). But Richardson's broad allegations of retaliation are unsubstantiated by *any* corroborative evidence. (Pet. App. Ex. A, p. 29-30)

(As noted infra, this finding is yet another important difference between the present case and the Seventh Circuit decision. There are many.)

REASONS FOR DENYING THE PETITION

A. There Is No Conflict Between the Circuits

The main argument that the petitioner has offered as to why this Court should grant certiorari is that there is a conflict between the Second Circuit's decision below with the Seventh Circuit's decision in *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1991) (hereinafter *Board of Governors*). This is simply not the case. The Second Circuit specifically discussed the many differences between this case and *Board of Governors, supra*, and concluded as follows:

> "Our case law does not permit us to follow this holding [*EEOC v. Board of Governors*] on the facts of this case." (emphasis added.)

The differences between these two cases are substantial with respect to both the law and the facts.

1. These two cases involve different statutes.

Board of Governors, supra, arose under the ADEA, and not under Title VII, as did the present case. Thus, to begin with, these two Courts of Appeals were dealing with different anti-retaliation

provisions which contain different language. The ADEA anti-retaliation provision states that:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

By contrast, Title VII's anti-retaliation provision provides in pertinent part as follows:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a)

In addition to these different statutory provisions, (which have produced their own case law) the

CBA provisions in these two cases are very different.

2. These two cases dealt with different CBA provisions.

a. The election of remedies provisions

In *Board of Governors*, *supra*, the Seventh Circuit had to interpret a CBA provision which was much more broad in its scope than the narrowly worded CBA provision in the present case. Specifically, the CBA provision in *Board of Governors* reads as follows:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this [**5] grievance procedure. (emphasis added).

This CBA provision clearly states that if an employee files a complaint in any other administrative forum (such as the EEOC) or in any other judicial forum (such as federal court), the employer then had no obligation to proceed further with the grievance procedure. This language gave the employer complete discretion as to whether or not to proceed with the grievance procedure after

an employee had filed a complaint in another forum. Obviously, such a provision would raise questions about the employer's motive for allowing the grievance to proceed in some cases, but not in others.

By contrast, the CBA provision in the present case only dealt with state law claims and CHRO complaints, and did not penalize the plaintiff in any way for filing federal law claims in complaints with the EEOC or in federal court. The CBA in the present case provides as follows in Article 15 Section 10:

> disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact.

The Second Circuit Court of Appeals found that it was very significant that this CBA provision had no impact whatsoever on plaintiff's ability to file with EEOC or in federal court. In the present case, the plaintiff did file with the EEOC and then in federal court, which the Second Circuit noted. (see p. 5 supra.)

Thus, the CBA in the present case only involves state laws claims brought before CHRO,

and not federal claims brought to EEOC or federal court. Indeed, the Title VII retaliation provision only protects federal claims filed with EEOC or in federal court, and not state law claims raised at CHRO.

Moreover, the defendant employer and the defendant union in the present case had no discretion about whether to continue with arbitration if a CHRO complaint was filed either before or after the grievance. Thus, the Second Circuit held that there was no "adverse action" by either the union or the employer:

> Richardson's claim fails because she has not made a prima facie showing that either agreeing to or adhering to the election-of-remedies provision constitutes an adverse employment action by either her employer or her union. (Petitioner's Appendix A, p. 21.)

By contrast, the CBA in *Board of Governors* required the employer to make a conscious decision, in every single individual case, about whether or not to proceed with the grievance procedure after a complaint had been filed "in any other forum, whether administrative or judicial". Id. In *Board of Governors*, the employer exercised that discretion by deciding not to allow the employee to proceed with the grievance process immediately after that employee filed his

complaint with EEOC. (In the present case, nothing whatsoever happened to the plaintiff when she filed her EEOC complaint, or when she filed her federal court action. The CBA in the present case only applied to plaintiff's CHRO complaint in which she raised her state law claims.)

b. The exhaustion provisions

The CBA in the present case allowed the plaintiff to pursue her grievance to arbitration as an individual (unlike the CBA in the *Board of Governors* case). Furthermore, the CBA in the present case allows its members (including plaintiff) to appeal to the Union's representative assembly in any case in which the Union does not proceed to arbitration (again, unlike the CBA in *Board of Governors*). The District Court held that the plaintiff failed to exhaust her administrative remedies under the union contract, and also failed to respond to the Union's defense of exhaustion:

> Moreover, the Union claims that Richardson did not exhaust her administrative remedies under the union contract. Richardson failed to respond to this claim. *See Briones v. Runyon*, 101 F.3d 287, 289 (2d Cir. 1996) ("Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion."). In particular, Richardson could have appealed the Union's decision not to

> proceed to the representative assembly, or she could have pursued the grievance to arbitration as an individual.

Petitioner's Appendix C, p. 12 fn 2.

The plaintiff in Board of Governors had no such options.

3. The Case law has changed since *Board of Governors* was decided.

Seventeen years ago when *Board of Governors* was decided, the Seventh Circuit Court of Appeals relied heavily upon *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). However, the *Gardner-Denver* doctrine, as it has become known since then, had not developed at that time.

When the Second Circuit decided the present case, it had the benefit of many more recent decisions from this Court explaining how *Gardner-Denver* should be applied. For example, cases such as *Circuit City v. St. Clair Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), *EEOC v. Waffle House*, 534 U.S. 279, 122 S.Ct. 754, 151 L. Ed. 2d (2002) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) are significant developments in the law which were decided after *Board of Governors*.

B. A Collective Bargaining Agreement Can Contain An Election of Remedies Provision Under Federal Law.

Petitioner's contention that the holding in *Gardner-Denver* made the election of remedies illegal in the context of the enforcement of employee statutory rights has now been answered to the contrary by this court. In *14 Penn Plaza v. Pyett*, ____ U.S. ____, 129 S.Ct. 1456, 2009 U.S. LEXIS 2497 (U.S. April 1, 2009), the plaintiff-employee bypassed a mandatory arbitration provision in the union contract and filed an age discrimination action in federal court. Interpreting *Gardner-Denver* to prohibit the waiver of federal claims, the District Court refused to compel arbitration, and the Second Circuit held that *Gardner-Denver* forbids the enforcement of collective bargaining provisions requiring the mandatory arbitration of ADEA claims. Recognizing the validity of such provisions that preclude resolution of discrimination claims in a federal judicial forum, this court stated: "As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained for exchange." *Id., at 1464. See also, NRLB v. Magnavox, Co.*, 415 U.S. 322, 328 (1974).

Under the ruling in *14 Penn Plaza*, the State of Connecticut and Local 4200 could have agreed to mandatory arbitration to resolve all claims of discrimination under both state and federal law. The current less burdensome provision in the CBA that gave the plaintiff a choice of forums to resolve her state law claim (either through arbitration or a CHRO complaint) leaving her free to pursue her federal rights through several forums must necessarily be valid.

The Petitioner contends that a choice of forum provision that limits a union employee's choices to either arbitration or state court (after filing a CHRO complaint) to resolve only a state law discrimination claim, violates Title VII's anti-retaliation provision. She is wrong. The *14 Penn Plaza* ruling grants employers and unions broad discretion to voluntarily fashion a procedure for resolving discrimination complaints that expressly limit multiple forums.

This point was made clear by this Court in *14 Penn Plaza* as follows:

> We recognize that apart from their narrow holding, the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

Id., at 1469.

The more recent rulings of this Court, such as Circuit City, Wright, and EEOC v. Waffle House, supra, (and especially the most recent ruling in 14 Penn Plaza) have modified the *Gardner-Denver* doctrine such that the CBA choice of forum provision in the present case certainly "passes muster", as the Second Circuit stated below. (Pet. App. Ex A, p. 20). These cases incrementally recognized the validity of election of remedies and choice of forum provisions under the Federal Arbitration Act.

Employers and unions are now free to use such provisions to resolve discrimination and retaliation claims within the limits set by this Court. As this Court has recognized, the economics of dispute resolution creates enormous pressure on employers and unions to maximize efficiencies and limit the duplication of resources. *Circuit City v. St. Clair Adams*, 532 U.S. 105, 123, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). In the present case the union and employer declined to expend resources on dual proceedings that could produce inconsistent results for state law claims that could be resolved in either of two forums.

The narrowness of the petitioner's argument cannot be over emphasized. Under the CBA provision at issue in this case, employees have access to both the EEOC and a federal judicial forum in which to fully litigate federal claims under Title VII, as well as a CHRO complaint or

arbitration for the state law claims. The Petitioner (Richardson) utilized the federal courts to litigate her discrimination and retaliation claims on the merits. The District Court expressly found that there was "overwhelming evidence" showing that the plaintiff was disciplined and then terminated for the legitimate non-retaliatory and non-discriminatory reason of her repeated workplace misconduct. The Second Circuit affirmed, and this is now the law of this case.

C. The Petitioner Essentially Seeks an AdvisoryOpinion Because The District Court Ruled That The Defendants Have No Liability Under Title VII.

Not only does *14 Penn Plaza* expressly permit choice of forum provisions in collective bargaining agreements, (thus destroying petitioner's *Gardner-Denver* argument) but the petition should also be denied for the reason that the uncontested law of the Petitioner's case renders moot the relief sought in the petition for certiorari. This court does not issue advisory opinions. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L.Ed. 2d 265, 120 S.Ct. 1382 (2000). The justiciability of a claim is moot when the issues are no longer "live." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L.ed. 2d 642, 99 S.Ct. 1379 (1979). When a dispositive ruling in a particular case

renders the controversy moot this court will necessarily decline to hear the case.

In *Ashcroft, Attorney General of Missouri v. Mattis*, 413 U.S. 171, 97 S.Ct. 1739, 52 L.Ed. 2d 219 (1977), the father of a boy killed by police officers, when he attempted to escape arrest sued under 42 U.S.C. § 1983, seeking monetary damages and declaratory relief that Missouri statutes authorizing police to use deadly force were unconstitutional. The district court denied both forms of relief on the ground of qualified immunity. Plaintiff only appealed the denial of declaratory relief. In a per curiam opinion this court denied the petition because the issue of the defendant's liability had been decided. Any declaratory ruling about the Missouri statute would not provide the plaintiff with any affirmative relief.

An analogous situation exists in the present case. The District Court found that Richardson was dismissed from her job for the legitimate non-retaliatory reason of her workplace misconduct. Her claim under Title VII having been fully resolved on its merits, a ruling about the validity of the CBA provision amounts to an advisory opinion. Even if this court were to rule that the challenged provision could be retaliatory, the plaintiff is still judicially bound by the finding that she was fired for cause.

CONCLUSION

For all the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Leonyer M. Richardson Plaintiff	:	
VS.	:	
STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS, OFFICE OF POLICY AND MANAGEMENT, CFEPE-AFT, AFL-CIO, ET AL. Defendants	:	Civil No. 3:02CV0625 (AVC)

RULING ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 31, 2005)

This is an action for damages and equitable relief brought in connection with a failed employment relationship. The complaint alleges disparate treatment in employment based on race and retaliation for engaging in protected activity. The action is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and alleges violations of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, *et. seq.* at §§ 2000e-2 and 3, and the Connecticut Fair Employment Practices Act ("CFEPA"), C.G.S. §§ 46a-58(a), 60(a)(1), (4) and (5).

The defendants, State of Connecticut Commission on Human Rights ("CHRO"), Office of Policy and Management ("OPM"), Leanne Appleton, and Cynthia

Watts-Elder now move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment asserting that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. The issues presented are whether the plaintiff, Leonyer M. Richardson, has raised a genuine issue of material fact: (1) that the defendant, CHRO, has violated Title VII under the theories of disparate treatment and retaliation; (2) whether the defendants, Appleton and Watts-Elder have violated Richardson's rights as secured by the equal protection clause of the Fourteenth Amendment to the United States Constitutional [sic] and 42 U.S.C. § 1981; (3) whether the defendant, OPM, has violated Title VII under the aforementioned theories; and (4) whether the CHRO and the OPM have violated the CFEPA.

For the reasons that hereafter follow, the motion is GRANTED.

FACTS

Examination of the complaint, affidavits, pleadings, Rule 56(c) statements, and exhibits accompanying the motion for summary judgment, and the responses thereto, disclose the following undisputed, material facts.

The plaintiff, Leonyer Richardson, is an African American woman who has been employed by the state of Connecticut for many years. In 1981, she began her career as a clerk typist for the Connecticut Department of Environmental Protection ("DEP"). At

some point, DEP promoted her to the position of fiscal administrative officer. In 1997, Richardson left DEP for a position with the Connecticut Office of Policy and Management ("OPM"). Just prior to leaving, one Richard Clifford, Chief of the Bureau of Outdoor Recreation, gave Richardson a written reprimand for allegedly exhibiting "offensive or abusive conduct toward . . . co-workers." While at the DEP, Richardson met the defendant, Cynthia Watts-Elder, also an African American woman. Watts-Elder later became Richardson's senior supervisor at the CHRO.

In November of 1997, on a recommendation from Watts-Elder, Richardson transferred to OPM as a fiscal administrative officer. On May 30, 2000, Richardson filed her first complaint of discrimination with CHRO against the defendant, OPM, in which she alleged being the victim of a hate crime because her desk had been "ram shacked" repeatedly. The complaint also alleged that her supervisors racially discriminated against her by harassing her in various ways on the job. OPM denied every one of the allegations. Richardson eventually withdrew her complaint.

In 2000, Watts-Elder, who was then acting Executive Director of CHRO, agreed to accept Richardson as a transfer employee from OPM. On October 6, 2000, Richardson transferred to CHRO, again in the capacity of fiscal administrative officer. The defendant, Leanne Appleton, a caucasian woman, was assigned as Richardson's direct supervisor. In Watts-Elder's view, Appleton is a highly competent business manager. According to Richardson, however, many of

Appleton's employees felt as though Appleton was discriminatory and demeaning.

On February 22, 2001, Appleton issued Richardson a written warning. The warning admonished Richardson for violating a direct order prohibiting computer use with another person's user-id and password. The warning also informed Richardson that Appleton was scheduling a series of meetings to discuss work requirements, and that Richardson had the right to union representation at these meetings.

On April 6, 2001, Appleton once again reprimanded Richardson with a written warning, asserting that she violated a direct order against contacting the comptroller's office, and another order regarding workplace conduct, including unacceptable e-mail, rude telephone calls, and abrupt notes.

On April 30, 2001, Richardson filed her first grievance against Appleton, accusing her of issuing a written warning without just cause, and of abusive, arbitrary, and discriminatory conduct.

In May, 2001, a dispute arose between Richardson and Appleton regarding the proper method for calculating energy consumption in various reports. According to Richardson, Appleton's calculations resulted in the misappropriation of funds from CHRO. After consulting with OPM, Appleton informed Richardson that the method Richardson had been using was incorrect and to use the correct formula in all future calculations.

On July 3, 2001, a dispute arose between Richardson and Appleton concerning Richardson's method of making bank deposits. On the same day, Richardson sent the following e-mail to Watts-Elder defending her position:

> I have proof that the deposits have always been done this way. I have made deposits according to what I was told to do when I first arrive here [sic], and that was "we (CHRO) do not do things like OPM does." I was told to make deposits based on receiving monies that was $500.00 or more. When I began to explain that I use [sic] to do deposits every week at OPM, it was then I was told that CHRO does things differently.
>
> Remember in the meeting we had with [Appleton], you and myself. She quoted that state [sic]
>
> This is retaliation on Leanne Appleton's part. She wants to make this a [Richardson's] issue, when in actuality, [Appleton] is responsible for allowing this to happen prior years.
>
> The last audit shows that. I probably have made deposit [sic] correctly than anyone before me. At least, I have done the deposits on a regular time fame [sic].
>
> This business office has been run terribly. I have never seen anything like it before in all of my 20 some years of state service.
>
> [Richardson]

On July 5, 2001, Richardson filed a second grievance against Appleton, again accusing her of being abusive, arbitrary, and discriminatory. According to Richardson, Appleton has singled her out with regard to untimely bank deposits and abuse of sick time. Richardson claims that another CHRO employee, one Kathy Stone, was also accused of making untimely bank deposits but was not disciplined.

On July 17, 2001, Appleton issued a third written warning to Richardson, this time alleging a violation of a directive requiring Richardson to explain 52 alleged untimely deposits and her failure to follow comptroller guidelines.

Meanwhile, Richardson's ultimate supervisor, Watts-Elder, hired one Herbetia Williams, an African American woman, to investigate Richardson's alleged misconduct. Later in July of 2001, Williams submitted her report, finding that Richardson had engaged in willful misconduct, stating:

> (1). [Richardson's] behavior clearly violates the Workplace Conduct Policy.
>
> (2). [Richardson's] behavior has created a hostile and chilling work environment.
>
> Examples include: screaming and slamming things; speaking to her supervisor in a loud voice; use of aggressive non-verbal communication; shaking her finger in Leanne's face; and constantly interrupting when others talk.

On July 30, 2001, Richardson filed a complaint with CHRO against CHRO alleging that the actions[1] taken by Appleton were both discriminatory and retaliatory. The CHRO dismissed the complaint on March 15, 2002 finding that "there is no reasonable possibility that further investigation will result in a finding of reasonable cause."

From August 6, 2001, to August 20, 2001, Watts-Elder placed Richardson on administrative leave for 10 days, this time without pay, alleging "offensive and abusive conduct towards co-workers, theft, misuse of state funds, property, or equipment. On August 20, 2001, when Richardson returned, Appleton asked her to prepare the August Energy Consumption Report using the correct calculation.

On September 19, 2001, Richardson responded by filing a third grievance accusing Appleton and CHRO staff of continuing "a pattern of lies, misrepresentations, ostracism, accusations . . . ," and placing a written warning in her personnel file without regard to her contract rights and for singling her out in an arbitrary manner. On September 6, 2001, Richardson also filed a complaint with EEOC against CHRO. On October 16, 2001, Watts-Elder fired Richardson "as a

---

[1] In her complaint, Richardson alleges "I have been discriminated against by Ms. Appleton because I have encountered 'character assassination' of her 'hostile, abusive, harassment, retaliation and arbitrary conduct against me in the workplace.'"

result of her insubordination and offensive conduct towards co-workers and supervisors."

Pursuant to her union contract, Richardson filed a grievance with respect to her job termination. On October 22, 2001, a hearing was held. Upon discovering that Richardson had amended her second complaint against CHRO to include an allegation of race discrimination regarding her termination, Richardson's union, A & R Local 4200 ("A & R"), withdrew its appeal of her grievance, as complaints of unlawful discrimination filed with CHRO are not subject to arbitration under the union contract.

On February 7, 2002, Richardson filed a complaint with the Auditors of Public Accounts ("APA") against CHRO alleging that CHRO violated state law by assigning Williams, who was not licensed as an investigator in Connecticut, to conduct the investigation of July, 2001, that resulted in a finding of willful misconduct. In response, the APA concluded that "a license is not required to review personnel matters, which apparently was what [Williams] did"

On April 9, 2002, Richardson filed a complaint with CHRO against her union (A & R Local 4200), alleging that "in withdrawing its request to arbitrate my grievances because I had filed complaints of discrimination and retaliation with the CHRO and the EEOC, the union has discriminated against me . . ." On September 4, 2002, CHRO dismissed the amended complaint on the grounds that "the Respondent's actions were in accordance with the union contract."

On April 9, 2002, Richardson filed a fourth complaint with CHRO, this time against OPM alleging that by executing a collective bargaining agreement with the A & R union (which provided that her discrimination complaints were not arbitrable if she also filed a CHRO complaint), that "OPM and the union have discriminated against me." On September 4, 2002, CHRO dismissed Richardson's complaint against OPM on the grounds that "there is no reasonable possibility that further investigation could result in a finding of reasonable cause" because "the Respondent's actions were in accordance with the union contract."

Shortly after Richardson was fired, she applied for unemployment benefits, which were contested by CHRO on the grounds that Richardson was fired for misconduct. The issue of whether CHRO discharged Richardson for willful misconduct was brought before the state of Connecticut Employment Security Appeals Division ("SAD"). Hearings were held before Appeals Referee Lee Ellen Terry, in which many witnesses testified under oath and were cross-examined by counsel. Richardson was represented by her attorney. Following an extensive investigation, the Appeals Referee concluded that:

> the employer, Commission on Human Rights and Opportunities – State of Connecticut, discharged the claimant, Leonyer M. Richardson, for *deliberate misconduct which constituted willful misconduct* in the course of her employment. As a result, the claimant

> [Richardson] is disqualified from receiving unemployment compensation benefits . . ."

On Appeal, the Board of Review issued a 6 page decision which affirmed the Referee's ruling in full.

On April 18, 2000, Richardson filed this lawsuit.

STANDARD

On a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute, and that it is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute regarding a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.), *cert. denied*, 506 U.S. 965, 113 S.Ct. 440, 121 L.Ed.2d 359 (1992) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." *Aldrich*, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

DISCUSSION

I. Count I: Title VII Violations Against The CHRO.

The complainant alleges Title VII violations against CHRO under two theories: (1) disparate treatment; and (2) retaliation for engaging in protected activity. The court considers each in turn.

1. Disparate Treatment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race . . . " 42 U.S.C. § 2000e-2(a)(1).

The analysis for a disparate treatment claim, which requires proof of discriminatory intent or motive, is governed by the well known *McDonnell Douglas* framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court has summarized the procedure as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the [adverse employment decision] . . . " Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of

> the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802, 804).

A. The Prima Facie Case

To make out a prima facie case of disparate treatment, a plaintiff must show that: (1) she belongs to a protected class; (2) she was performing her duties satisfactorily; (3) the defendant took adverse action against her; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *See e.g. Dister v. Continental Group*, Inc. 859 F,2d 1108, 1114 (2d Cir. 1988); *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994); *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). The burden that an employment discrimination plaintiff must meet in order to defeat summary judgment at the prima facie stage is *de minimis*. *McLee*, 109 F.3d at 134.

For purposes of discussion only, the court will assume that the plaintiff has made out a prima facie case of race discrimination, in that her race is protected by Title VII, she was performing her duties satisfactorily, and the CHRO did, indeed, take adverse action against her, including issuing her three written warnings, suspending her two times, and eventually terminating her employment.

B. The Defendant's Non-Discriminatory Reason

To rebut an inference of discrimination established by the plaintiff's prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action. *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991). The defendant must state a "clear and specific" reason. *Meiri v. Dacon*, 759 F.2d 989, 997 (2d. Cir. 1985). Here, the CHRO has stated that it took the actions condemned because of the plaintiff's "insubordination, poor performance, and violence in the workplace." The court is satisfied that the defendant has sufficiently rebutted the inference of discrimination raised by the plaintiff's prima facie case.

C. Pretext/Discrimination

In the final stage of the *McDonnell Douglas* analysis, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reason articulated by the defendant for the adverse action was false, and that the real reason for the action was illegal discrimination. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 141 (2d Cir. 1993). The plaintiff has failed to meet this burden.

In support of her race discrimination claim, Richardson argues that she "is aware of other similarly situated employees, namely, one Kathy Stone, who was accused of the same work misgivings as the plaintiff and was not disciplined." However, Richardson

has offered no evidence to support this contention. The record contains nothing more than an email that Richardson herself sent to Watts-Elder on July 3, 2001, defending her method of making monetary deposits – a method that subjected Richardson to discipline in the form of a written warning.[2]

This evidence cannot satisfy the burden of proving pretextual discrimination where, as here, there is overwhelming evidence of her insubordination and hostile behavior supporting the CHRO's legitimate business reason for the warnings, suspension and employment termination. *See e.g., Getschmann v. James River Paper Co.*, Inc., 822 F. Supp. 75, 78 (D. Conn. 1993) (favorable prior work performance and two discriminatory statements by a supervisor were "too slender a reed to carry the weight of the charge" at summary judgment where there was overwhelming evidence of legitimate business reason). The overwhelming evidence here includes a finding by the Connecticut Employment Security Appeals Division that Richardson was fired "for deliberate misconduct which constituted willful misconduct in the course of her employment." The record also includes a finding by independent investigator, Williams, that "[the plaintiff's] behavior

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[2] On July 17, 2001, Appleton issued Richardson a written warning for "violation of a directive to provide explanation for 52 untimely deposits and failure to follow comptroller guidelines."

clearly violates the Workplace Conduct Policy." Specifically, Williams found that:

> [the plaintiff's] behavior has created a hostile and chilling work environment. Examples include: screaming and slamming things; speaking to her supervisor in a loud voice; use of aggressive non-verbal communication; shaking her finger in Leanne's face; and constantly interrupting when others talk.

Particularly troublesome to Richardson's case is the fact that her several suspensions and job termination were at the behest of Watts-Elder, herself an African American woman, but more importantly, the same person who recommended Richardson to the OPM in 1997 and then facilitated Richardson's transfer to the CHRO in 2000. Accordingly, the CHRO is entitled to judgment as a matter of law on the race discrimination claim.

2. Retaliation

Title VII also makes it unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a).

The *McDonnell Douglas* burden shifting framework which is applicable to claims of disparate treatment also applies to claims of retaliation. See

Richardson v. N.Y. State Dep't. of Correctional Service, 180 F.3d 426, 443 (2d. Cir. 1999).

> In the context of a motion for summary judgment, the plaintiff must first demonstrate a prima facie case of retaliation, after which the defendant has the burden of pointing to evidence that there was a legitimate, nonretaliatory reason for the complained action. If the defendant meets its burden, the plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation. *Id.*

A. The Prima Facie Case

"To establish a prima facie case of retaliation, a plaintiff must show: (1) participation in a protected activity that is known to the defendant; (2) an employment decision or action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse decision." *Id.*

(i) Known Protected Activity

The plaintiff has argued that she engaged in protected activity on at least four occasions: (a) when she filed her first grievance against Appleton on April 30, 2001; (b) when she filed her second grievance against Appleton on July 5, 2001; (c) when she filed a complaint against the CHRO with the CHRO on July 30, 2001; and (d) when she filed a complaint against

the CHRO with the APA concerning Williams' investigation.

(ii) Adverse Employment Action

Richardson claims the CHRO retaliated against her in three ways: (a) by issuing her three written warnings; (b) by suspending her two times; and (c) by terminating her employment.

(iii) Causal Connection

The court will assume for purposes of discussion only that the plaintiff has established a causal relationship.

B. The Defendant's Non-Discriminatory Reason

To rebut an inference of retaliation established by the plaintiff's prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action. *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991). The defendant must state a "clear and specific reason. *Meiri v. Dacon*, 759 F.2d 989, 997 (2d. Cir. 1985).

Although Richardson has established a prima facie case of retaliation, the defendant has countered with a legitimate non-discriminatory reason for the alleged retaliation, "namely insubordination, poor performance, and violence in the workplace." The court is satisfied that CHRO has sufficiently rebutted

the inference of retaliation raised by Richardson's prima facie case.

C. Pretext/Discrimination

In the final stage of the *McDonnell Douglas* analysis, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reason articulated by the defendant for the adverse action was false, and that the real reason for the action was retaliation. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 141 (2d Cir. 1993). "[A] plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). Here, Richardson's broad statements: "the reason [for the suspension] was false and pretextual because the plaintiff had never violated any such orders" and "On October 16, 2001, Watts-Elder terminated the plaintiff's employment for the same false and pretextual reasons," unsubstantiated by any corroborative evidence, are insufficient to show pretext. Accordingly, the CHRO is entitled to judgment as a matter of law on the retaliation claim.

II. Count Two: Race and Color Discrimination and Retaliation Against Defendants Appleton and Watts-Elder In Violation of 42 U.S.C. §§ 1981 and 1983 and the Connecticut Constitution.

In Count Two, Richardson alleges that Appleton and Watts-Elder violated her right to equal protection of the laws as secured by the Fourteenth Amendment. She brings this action against Watts-Elder in her official capacity and against Appleton in her individual capacity pursuant to 42 U.S.C. §§ 1981 and 1983.

1. Watts-Elder In Her Official Capacity

The defendant argues that "the claim against Watts-Elder must be dismissed because [as a claim against Watts-Elder in her official capacity] it is barred by the 11th Amendment." Richardson does not contest this in her brief, but rather "requests leave to amend her complaint to cure the technical defect and reflect an action against defendant Cynthia Watts-Elder in her individual capacity."

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "As interpreted, the Eleventh Amendment generally prohibits suits against state

governments in federal court." *Richardson v. New York*, 180 F.3d 426, 447-48 (2d. Cir. 1999) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). "This immunity also extends to state officials sued in their official capacities." *Alungbe v. Bd. of Trustees*, 283 F. Supp. 2d 674, 687 (D. Conn. 2003) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

Because Richardson has sued Watts-Elder in her official capacity only, the claims against Richardson [sic] are barred by the Eleventh Amendment. Further, because leave to amend may only be granted at this juncture based upon argument under Fed. R. Civ. P. 15(a), and no such argument is presented here, the court declines to allow any such amendment.

2. Appleton In Her Individual Capacity

Appleton first argues that Richardson cannot prove a prima facie case under 42 U.S.C. § 1981 because 42 U.S.C. § 1983 is the exclusive remedy against state actors for the violation of Constitutional rights. Richardson does not respond to this assertion.

A. Section 1981

Section 1981 provides, in relevant part, that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the

full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . . " 42 U.S.C. § 1981(a).

In *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), the Supreme Court held that "the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." *Jett*, 491 U.S. at 735; *see also Patterson v. County of Oneida*, 375 F.3d 206 (2d Cir. 2004) ("The express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units"). Because there is no dispute that Appleton is a state actor, the court concludes that § 1983 provides the exclusive remedy for violation of her constitutional rights.

B. Section 1983

Section 1983 allows an action against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, "that conduct [is] also action under color of state law and will support a suit under § 1983." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982). "State employment is generally sufficient to render the defendant a state actor." *Patterson*, 375 F.3d 206, 230 (2d Cir. 2004). "Once action under color of state law is established, [Richardson's] equal protection claim parallels [her] Title VII claim. See *Feingold v. New York*, 366 F 3d 138, 159 (2d Cir. 2004). "[T]he elements of one are generally the same as the elements of the other and the two must stand or fall together." *Id.*

Here, Richardson alleges that "the actions of Appleton . . . were under color of law and violated Ms. Richardson's rights . . . to equal protection of the laws as protected by the Fourteenth Amendment to the U.S. Constitution . . . " However, because Richardson has failed to raise a genuine issue of material fact as to her Title VII claims, her § 1983 claim must fail as well. Accordingly, Appleton is entitled to judgment as a matter of law on her claim of Constitutional violations.

III. Count Three: Title VII Violations As Against The OPM

In Count Three, Richardson alleges that the OPM violated Title VII by "challenging the arbitrability of the Richardson grievances because she had filed complaints of discrimination and retaliation with the CHRO and the EEOC," and by "negotiating and executing provisions of a collective bargaining agreement that allowed the State, through OPM, to retaliate against employees, including Ms. Richardson."

OPM argues that "[Richardson's claim] . . . that her collective bargaining agreement ("CBA") violated the retaliation provisions of Title VII is misdirected." The defendant points out that the terms of Richardson's CBA preclude her from arbitrating discrimination claims once she has filed a CHRO complaint against OPM and also that the Federal Arbitration Act ("FAA") gives great deference to parties' agreements not to arbitrate. The CBA states, in pertinent part:

> Notwithstanding any other provisions of this agreement, the following matters shall be subject to the grievance procedure but not to arbitration:
>
> . . .
>
> (2) disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on

> Human Rights and Opportunities arising from the same common nucleus of operative fact.

Richardson does not contest the preclusive language of the CBA, but argues instead that "Richardson's action is not barred by the FAA."

The Federal Arbitration Act ("FAA") provides, in relevant part, that a written provision in "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. According to the Supreme Court, "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *EEOC v. Waffle House*, 534 U.S. 279, 293 (2002) (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* 489 U.S. 468, 478 (1989)).

Here, Richardson and her Union have not agreed to arbitrate – the CBA includes an express provision *not* to arbitrate. The provision does not violate the FAA, and it cannot give rise to an inference that OPM, by enforcing the terms of the CBA, was motivated by a discriminatory animus. Accordingly, OPM is entitled to judgment as a matter of law on the Title VII claim.

IV. Counts One and Three: CFEPA Violations Against The CHRO and The OPM.

In Counts One and Three, Richardson alleges that the CHRO and the OPM violated the CFEPA by discriminating against her on the basis of her race and color and because she previously opposed and filed complaints of race and color discrimination.

CHRO and OPM respond, however, that Richardson's state law claims against them are barred by the Eleventh Amendment because Connecticut has not waived its immunity in federal court. Richardson does not respond to this assertion.

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "As interpreted, the Eleventh Amendment generally prohibits suits against state governments in federal court." *Richardson v. New York*, 180 F.3d 426, 447-48 (2d. Cir. 1999) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984)). "This immunity also extends to state officials sued in their official capacities." *Alungbe v. Bd. of Trustees*, 283 F. Supp. 2d 674, 689 (D. Conn. 2003) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). "This protection presupposes: (1) that each state is a sovereign entity in our federal system; and (2) that it is inherent in the nature of sovereignty not

to be amenable to the suit of an individual without its consent." *Close v. New York*, 125 F.3d 31, 36 (2d. Cir. 1997) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

Eleventh Amendment immunity is not absolute, however. "To the contrary, a state may be divested of immunity and haled into federal court in one of two ways: (1) Congress may abrogate the sovereign immunity through a statutory enactment; or (2) a state may waive its immunity and agree to be sued in federal court." *Richardson*, 180 F.3d at 448 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)). "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* (citing *Atascadero*, 473 U.S. at 241). "The fact that a state has consented to suit in the courts of its own creation does not mean that it consents to suit in federal court." *Page v. Connecticut Dep't of Public Safety*, 185 F. Supp. 2d 149, 159 (D. Conn. 2002) (citing *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900)). Stated differently: "A state may consent to suit in its own courts without consenting to suit in federal court." *Alungbe*, 283 F.Supp. 2d at 687 (citing *Smith*, 178 U.S. at 441-45).

Connecticut law provides that:

> Any person who has timely filed a complaint with the Commission on Human Rights and Opportunities in accordance with section 46a-82 and who has obtained a release from the commission in accordance with section

> 46-83a or 46a-101, *may also bring an action in the superior court* for the judicial district in which the discriminatory practice is alleged to have occurred or in which the respondent transacts business, except any action involving a state agency or official may be brought in the superior court for the judicial district of Hartford.

(Italics added) Conn. Gen. Stat. § 46a-100. "Under Connecticut law, Connecticut waived its immunity for suit in state court for CFEPA claims. But it has not clearly expressed a waiver to suit in federal court. Therefore, the courts of this district have consistently found that CFEPA claims against the state or its agents are barred by the Eleventh Amendment." *Alungbe*, 283 F. Supp. 2d at 687 (citing e.g. *Lyon v. Jones*, 168 F. Supp. 2d 1, 6 (D. Conn. 2001)). Accordingly, the CHRO and the OPM are entitled to judgment as a matter of law on the state law claims.

Count IV: Retaliation against Defendants Yelmini and Bardot in violation of 42 U.S.C. §§ 1981 and 1983 and the Connecticut Constitution.

Because Richardson has not addressed these allegations in her brief, she has failed to raise a genuine issue of material fact as to Count IV. Accordingly, the defendant's motion for summary judgment is GRANTED as to Count IV.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment (document no. 37) is hereby GRANTED.

It is so ordered this 31st day of March, 2005, at Hartford, Connecticut.

/s/

Alfred V. Covello
United States District Judge

OPPOSITION BRIEF

(4)

No. 08-1226

In The
Supreme Court of the United States

LEONYER RICHARDSON,

Petitioner,

vs.

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, OFFICE OF POLICY AND MANAGEMENT, CYNTHIA WATTS-ELDER, LEANNE APPLETON, LINDA YELMINI, DONALD BARDOT and ADMINISTRATIVE AND RESIDUAL EMPLOYEES UNION,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT, ADMINISTRATIVE & RESIDUAL EMPLOYEES UNION LOCAL 4200 CFEPE, AFT, AFL-CIO

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QUESTION PRESENTED FOR REVIEW

Whether, under Title VII of the Civil Rights Act of 1964, a State employees' union and the State may collectively bargain for and agree to an election of forum clause which precludes arbitration of an employee's discrimination grievance in the event that the employee also files an administrative complaint of discrimination with the State agency that enforces discrimination law.

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Respondent Administrative and Residual Employees Union, Local 4200 CFEPE, AFT, AFL-CIO (the "Union") files this brief in opposition to the Petition for a Writ of Certiorari (the "Petition").

INTRODUCTION

Petitioner's claim is moot and she lacks standing to advance a further appeal. Moreover, this case does not present any question that divides the circuits or that presents important unresolved issues. Rather, this case involves a unique collective bargaining agreement provision of a type that does not appear to have been the subject of any prior published appellate decision. Moreover, this Court's recent decision in *14 Penn Plaza v. Pyett* erases any doubt that the type of provision is permissible.

STATEMENT

I. FACTS

The Petitioner, Leonyer Richardson, was employed as fiscal administrative officer for the State of Connecticut Commission on Human Rights ("CHRO"), beginning on October 6, 2000. Pet.App.C 3. Prior to that time, she had been employed by the Department of Environmental Protection ("DEP") and Office of Policy and Management ("OPM"). Pet.App. 2-3. While at DEP and OPM, Petitioner had interpersonal conflicts with her co-workers and DEP reprimanded her for threatening a co-worker. *See* Pet.App.C 3.

Shortly after her transfer to CHRO, Petitioner began to exhibit misbehaviors similar to those she exhibited at OPM and DEP. In February 2001, Petitioner received a written warning from her supervisor, Leanne Appleton ("Appleton"), for violating the security of the CHRO computer system. Pet.App.C 3. On April 6, 2001, Petitioner received another written warning for several infractions, including violating a direct order, hanging up on Appleton, and leaving her rude notes. Pet.App.C 3-4. On July 17, 2001, the Petitioner was issued another warning for failing to explain her actions as requested. Pet.App.C 4. As a result of her insubordination and offensive conduct towards co-workers and supervisors, on October 16, 2001, Cynthia Watts-Elder ("Watts-Elder"), the CHRO's Executive Director, terminated Petitioner's employment. Pet.App.C 5.

II. THE COLLECTIVE BARGAINING AGREEMENT

Many of the terms and conditions of the Petitioner's employment with the CHRO were governed by a collective bargaining agreement (the "CBA") between the Union and the State of Connecticut. Pet. 4. The election of forum provision contained in the CBA states, in pertinent part:

> disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the

same common nucleus of operative fact.

Pet.App.C 7.

III. THE PETITIONER'S DISCHARGE AND HER GRIEVANCE AGAINST THE CHRO

The Petitioner grieved her termination and on October 22, 2001 a hearing was held by the State Office of Labor Relations. Pet.App.C 5. Thereafter, the Union learned that the Petitioner had amended a then-pending CHRO administrative complaint to include a race discrimination claim regarding her termination. Id. As a result, and in accordance with the CBA's election of forum provisions, the Union notified the Petitioner that it was withdrawing its request for arbitration of her grievance regarding her termination. Id.

On April 9, 2002, the Petitioner filed an administrative complaint of discrimination against the Union, alleging that the Union had retaliated against her by refusing to take her grievance to arbitration. Pet.App.C 5-6. A Charge of Discrimination was filed on the same date with the United States Equal Employment opportunity Commission ("EEOC") incorporating the same allegations. Pet.App.A 8. On September 4, 2002, the CHRO dismissed the Petitioner's complaint, finding that the Union's actions were in accordance with the CBA. Pet.App.A 9.

IV. PROCEDURAL HISTORY

In April 2002, the Petitioner commenced a civil action in the United States District Court for the District of Connecticut naming as defendants the CHRO, OPM, Appleton, Linda Yelmini ("Yelmini"), Donald Bardot ("Bardot") and Watts-Elder (collectively the "State Defendants"), as well as the Union. Pet.App.A 9. In her complaint she alleged retaliation and/or racial discrimination against each defendant. Id.

Petitioner claimed that the CHRO and OPM retaliated against her and discriminated against her based on her race and color, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Connecticut Fair Employment Practices Act ("CFEPA"). Id. She also made other claims under 42 U.S.C. §§ 1981 and 1983.

Petitioner further claimed that the Union violated Title VII and CFEPA, as well as the duty of fair representation. Pet.App.C 2. These claims were based on her allegation that in negotiating and executing a collective bargaining agreement that allowed the State to retaliate against employees, including Petitioner, who exercised their rights to file discrimination complaints with the CHRO, the Union had discriminated against Petitioner, and other similarly situated union members. Pet. 2-3.

In June 2004, the State Defendants filed a motion for summary judgment, seeking disposition in their favor of all claims against them. Pet.App.B 6. On March 31, 2005, the district court issued an order

granting the State Defendants' motion for summary judgment. Pet.App.A 9. The district court held that the State Defendants had offered sufficient legitimate, non-discriminatory reasons for their treatment of the Petitioner, and that she had offered insufficient evidence that the reasons given were pretextual. Pet.App. 9-10. The district court also held similarly regarding the Petitioner's retaliation claim and held that OPM had not violated Title VII by virtue of its execution of the CBA's election of forum clause. Pet.App. 10. The district court granted the State Defendants' motion for summary judgment in its entirety. Pet.App.C 6-7.

Thereafter, the Petitioner filed a motion to alter judgment seeking to have the district court "correct" its ruling on the motion for summary judgment, arguing that only the State Defendants, and not the Union, had moved for summary judgment and the court's opinion addressed only the counts against the State Defendants. Pet.App.C 1-2. The Union opposed the Petitioner's motion, arguing, inter alia, that the court's conclusions in its summary judgment decision entitled the Union to summary judgment as well. After reviewing that motion, the district court held that the Union had not violated Title VII, CFEPA, Sections 1981 or 1983, or its duty of fair representation because the CBA's election of forum provisions were valid and the Union simply proceeded according to contract. Pet.App.A 11; Pet.App.C 10-15. Thus, on November 29, 2005, the district court corrected its judgment, making it applicable to all defendants, including the Union. Pet.App.C 16.

On January 27, 2006, Petitioner filed a notice of appeal. On July 7, 2008, the Second Circuit issued its order affirming the grant of summary judgment. Pet.App.A. The Second Circuit held that the CBA election of forum provision did not violate the prohibition on prospective waivers of Title VII rights and that the Union's withdrawal from arbitration did not constitute an adverse employment action. The Second Circuit elaborated that the CBA election-of-forum provision qualified as a "reasonable defensive measure" by the State to litigate discrimination claims brought against it effectively and efficiently. Pet.App.A 20-27.

Moreover, the Second Circuit agreed with the district court that the Petitioner's insubordination and hostile behavior were legitimate, non-race based reasons for her termination, and that she presented no evidence to support allegations of retaliation against her employer. Pet.App.A 28-30. In her Petition, Petitioner has not challenged the Second Circuit's holding on this wrongful termination claim.

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States sets forth the standard that has long governed petitions for review on certiorari: petitions are granted only "for compelling reasons." Rule 10 also sets forth what are generally considered to be "compelling reasons," which include: where a federal appeals court has decided a matter contrary to how this Court, a federal appeals court, or a state court of last resort has decided a similar matter; where a federal appeals court has vastly departed

from the accepted and usual course of judicial proceedings or where there is an important unsettled question of federal law. Here, the issue is moot and Petitioner therefore lacks standing to advance any further appeal. Moreover, there are no such compelling reasons for granting the Petition.

I. PETITIONER'S CLAIM IS MOOT AND SHE LACKS STANDING TO ASSERT THIS APPEAL.

The Second Circuit affirmed the district court's holding that the Petitioner's discharge did not violate Title VII. The Petitioner has not appealed that ruling and it has become the law of the case. Any arbitration proceeding would, therefore, have to honor the holding of the trial court that Title VII was not violated. As such, an arbitration would be pointless; there is no practical relief available to the Petitioner from this Court that could reinstate her to her job or otherwise provide her with any benefit. Consequently, the issue raised on appeal is a moot point and the Petitioner cannot point to any injury in fact.

> A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever' to

> the prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory.

(Citations, quotation marks omitted) *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).

Here, even if the Court were to find that the CBA election of forum provision was retaliatory, no effectual relief could be granted. The law of the case dictates that her discharge was lawful and that any arbitration would have been unsuccessful. Moreover, any future arbitration of this matter ordered by the district court on remand would be ineffectual because the district court's decision would be binding upon the arbitrator. *See, e.g., Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007) ("where the prerequisites for collateral estoppel are satisfied arbitrators must give preclusive effect to prior federal judgments."). The Petitioner therefore lacks a legally cognizable interest in the outcome of this case and her case is moot. Furthermore, the case is moot because Petitioner is no longer employed by the State so the CBA does not govern her employment, and there is no risk that the alleged wrong will be repeated.

For these same reasons, the Petitioner cannot meet Article III's standing requirement. To satisfy Article III's standing requirements, a plaintiff must show (1) she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to

merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). To establish redressability, must show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 181.

Here, the Petitioner's alleged harm is entirely hypothetical. She only suffered harm if she would have prevailed in her arbitration, which the district court, by granting summary judgment to the State on her wrongful discharge claim, determined she would not have. As such, the Petitioner cannot show that she suffered an injury that can be redressed by a favorable decision, and the Court need not reach the supposed "important question" proposed in the Petition.

II. PETITIONER FAILED TO EXHAUST HER INTERNAL REMEDIES WITH THE UNION.

Where reinstatement of a grievance may be effectuated through a union appeals process that reverses a union's initial decision, that union is entitled to a failure to exhaust defense. *See Clayton v. United Automobile Workers*, 451 U.S. 679, 691 n18 (1981) (finding such a defense available to employers); *see also Stepney, LLC v. Fairfield*, 263 Conn. 558, 563, 821 A.2d 725 (2003) ("[i]t is a settled principal of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter.").

In this case, the district court found that Petitioner could have appealed to the Representative Assembly the Union's decision not to proceed to arbitration, or she could have pursued her grievance not through her Union, but as an individual. Pet.App.C 12. Petitioner failed to respond to this argument in the district court, did brief it in her appeal to the Second Circuit, and has failed to address it here. As such, this serves as an alternative ground to affirm summary judgment in the Union's favor, and means that the Petition can be denied on this basis and the Court can avoid addressing the alleged important question Petitioner sets forth in her Petition.

III. THE COURT'S RECENT DECISION IN 14 PENN PLAZA V. PYETT REQUIRES DENIAL OF THE PETITION.

Subsequent to Petitioner's filing of her Petition, this Court decided *14 Penn Plaza LLC v. Pyett*, -- U.S. --, 129 S.Ct. 1456 (2009), holding that a provision in a collective bargaining agreement expressly requiring union members to arbitrate age-discrimination claims is enforceable. The reasoning of the decision is equally applicable to Title VII claims. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The "interpretation of Title VII ... applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII,' " (citation omitted)).

Pyett was the culmination of a sea change beginning with the decision of the Court in *Gilmore*

v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991), and continuing with its decisions in *Waffle House v. EEOC*, 534 U.S. 279 (2002), and *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), each of which signaled a greater willingness to recognize election of forum provisions to resolve federal statutory anti-discrimination claims. These decisions also signaled an increasing retreat from the position taken by the Court in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which prohibited prospective waivers of Title VII claims, and assumed that an agreement to arbitrate Title VII claims was tantamount to a waiver of those claims. The *Pyett* court deemed this assumption to be erroneous and stated that it "rested on a misconceived view of arbitration that this Court has since abandoned." *Id.* at 1469. Therefore, Petitioner's argument that *Gardner-Denver* is at tension with other Supreme Court precedent, or that that it is contrary to the Second Circuit's holding in this case, is without merit. In *Pyett,* the Court settled these concerns.

Pyett leaves no doubt that the Union and the Petitioner's former employer could have agreed to mandate arbitration of her Title VII and CFEPA claims. If the CBA could have mandated arbitration of those claims, surely it could have been more generous and given her a ***choice*** whether to pursue arbitration or to bring an administrative discrimination claim with the CHRO.[1] To hold

[1] Under the terms of the CBA, even if Petitioner chose arbitration, she still could have filed a Title VII charge with the EEOC.

otherwise would yield a result that is incongruous with *Pyett*, among other Supreme Court precedent.

Petitioner notes in her Petition that "[t]his Court has specifically declined to reach the question whether a collective bargaining agreement may encompass the waiver of employment discrimination claims." Pet. 6-7. Petitioner further states that this case presents issues of fundamental national importance because "it presents an opportunity for "this Court to resolve once and for all time the tension between *Gardner-Denver* and more recent precedent [suggesting statutory discrimination claims can be compelled to arbitration]" Pet. 15. Now that this issue had been unequivocally resolved by the Court, the Petition fails to present any "compelling reasons" for granting the Petition, and should be denied.

IV. THE PROVISION AT ISSUE DID NOT AFFECT PETITIONER'S ABILITY TO FILE FEDERAL DISCRIMINATION CLAIMS.

The CBA clause at issue here provided only that, in the event that a discrimination complaint is filed with the CHRO, any pending grievance regarding the same alleged discrimination would not proceed to arbitration. As the Second Circuit observed, "Richardson remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf." Pet.App.A 20. The Second Circuit elaborated as follows:

> [The clause] does not foreclose other avenues of relief, such as the right to pursue claims in federal court, which was at issue in *Gardner-Denver*, or the right to pursue claims with non-CHRO bodies such as the EEOC. Indeed, the CBA does not appear even to foreclose subsequent filing of claims with the CHRO. . . . It only requires that the employee make a concrete choice, at a specific time, between filing a state claim with the CHRO and having the union pursue his or her grievance in arbitration.

Pet.App.A 23. No other court appears to have addressed a collectively-bargained clause like the one at issue in this case, and there is no evidence that such clauses are common. This discredits Petitioner's claim that "this case presents issues of fundamental national importance." Pet. 14.

These facts distinguish this case from *EEOC v. Board of Governors of State Colleges & Univs.*, 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 506 U.S. 906 (1992), which Petitioner characterizes as being at odds with the Second Circuit's decision in this case. Pet. 7. The CBA provision in *Board of Governors* stated that the right to an in-house arbitration vanished where "an employee seeks resolution of the matter in any other forum." *Id.* at 426. That provision obviously contemplated a waiver of arbitration where a charge of discrimination alleging a violation of Title VII claims was filed with the EEOC. Therefore, the plaintiff in *Board of*

Governors would have been forced to waive federal statutory rights if he pursued arbitration. Here, however, under the CBA, Petitioner could have filed a complaint with the EEOC based on Title VII violations without forfeiting any contractual right to arbitration. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) (EEOC has concurrent jurisdiction with state deferral agencies). As the court observed in *United States v. New York City Transit Auth.*, 97 F.3d 672 (2d Cir. 1996), "*Board of Governors* [is] therefore distinguishable on the ground that the assertion of Title VII rights in th[at] case[ ] cost employees the right...to proceed in a binding arbitration...." *Id.* at 679. The Petitioner's failure to exhaust her remedies also distinguishes this case from the cases cited by the Petitioner, especially *Board of Governors*.

Moreover, *Board of Governors* was decided at a time when the prevailing law in the Seventh Circuit was that statutory discrimination claims could not be subject to compulsory arbitration by virtue of a collective bargaining agreement. In this regard, the *Board of Governors* court stated: "Nor may the Board successfully argue that unions be permitted to waive an employee's rights under the ADEA, for it is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining." 957 F.2d at 431. Given this Court's holding to the contrary in *Pyett*, the law applicable in the Seventh Circuit has changed, and the continuing validity of *Board of Governors* is in doubt.

V. THE NEGOTIATION OF THE PROVISION WAS A REASONABLE DEFENSIVE MEASURE AND NOT RETALIATORY.

The Second Circuit's decision was based largely on the recognition that the agreed-to clause constituted a "reasonable defensive measure" that did not violate federal law. In *New York City Transit Authority*, the Second Circuit held that the Transit Authority's policy of directly referring discrimination litigants to its law department, rather than first directing them to an internal EEO Division as it would non-litigant complainants, was not discriminatory. 97 F.3d at 677-78. The differential treatment effectuated by this policy was explained as the consequence of a "reasonable defensive measure"--i.e., centralizing the City's authority to respond to discrimination suits--that would not support an inference of retaliatory motive. *Id.* at 677. In so holding, the court offered the following observation:

> [I]t seems obvious that the commencement of litigation or administrative proceedings would galvanize the employer to seek legal counsel or otherwise to shift tactics. This phenomenon does not support an inference of retaliation. Legitimate and ordinary defensive interests furnish all the cause and effect needed to account for it.

Id. at 678.

The First Circuit also has endorsed an analysis similar to the "reasonable defensive measure" analysis. In *New England Health Care Employees Union, Dist. 1199 v. Rhode Island Legal Svcs.*, 2001 WL 34136692 (D.R.I. 2001), *affirmed by* 273 F.3d 425 (1st Cir. 2001), the relevant collective bargaining agreement provided that: "RILS shall not be required to arbitrate any dispute which is pending before any administrative or judicial agency." After the employee filed a grievance alleging she was discriminatorily discharged because of her physical disability, she filed an administrative complaint of discrimination with the Rhode Island Human Rights Commission (RIHRC) alleging violations of state and federal anti-discrimination law. The arbitrator denied the grievance on the ground that arbitration was barred by the contract. In an action by the employee's union to vacate the award and against the employer for retaliation, the court granted summary judgment to the employer. The court stated:

> RILS has articulated a legitimate non-discriminatory reason for Article 20.3(f); namely, to prevent the wasteful duplication of effort and the risk of inconsistent results that is inherent in simultaneously defending the same claim in two fora....[E]ven if a right to arbitrate matters that are the subject of other proceedings existed, and the loss of that right could be characterized as adverse employment action, the retaliation claim fails because there is no basis for inferring that Article 20.3(f)

> was prompted by any discriminatory purpose. On the contrary, the provision is contained in a CBA negotiated at arms length, between RILS and the Union itself. Consistent with the National Labor Relations Act's policy of deferring to the collective bargaining process as a means of resolving workplace disputes, see 29 U.S.C. § 151, courts, properly, are hesitant to invalidate provisions of a CBA without good reason.

Id. at *3.

Here, the Petitioner was a CHRO employee at the time that she filed her grievance that the Union refused to bring to arbitration. The CHRO certainly had the right to preclude duplicative discrimination complaints against it in two fora it sponsors by limiting state law discrimination complainants to either arbitration or an administrative complaint. By filtering some of the discrimination complaints against it (those that were proceeding to arbitration), through its administrative arm rather than a State arbitrator, the CHRO employed a reasonable, cost-conserving measure. The Petitioner's right to redress for her federal discrimination claims remained intact, for she could have pursued such claims with the EEOC.

The Union did not retaliate against Petitioner by agreeing to follow a legitimate practice under *New York City Transit Authority*. There are several legitimate and non-discriminatory reasons for the

CBA clause at issue here. First and foremost, such a clause is the product of arms-length negotiations between the Petitioner's elected representatives and her employer. In no way is the Union punishing members by agreeing to the clause or by abiding by it; rather, by proxy, the membership has agreed to the provision. The Union ostensibly received benefits in consideration for defining its members' privileges in order to secure other contractual rights evident in the CBA. Additionally, the clause confers a benefit on the Union membership: elimination of wasteful costs. By eliminating the possibility of some duplicative litigation, the Union could more cost-effectively advocate for its members where those efforts were more needed. Unions operate with limited resources and must make attempts in negotiating collective bargaining agreements to allow for the most efficient advocacy for their membership. At the same time, the CBA's exception is narrowly tailored to ensure that members' rights are protected because they are only required to forgo duplicative claims in certain situations, those that would burden the CHRO unduly with claims in two fora under its control.

Petitioner has not and cannot point to any disagreement among the circuits as to the applicability of the "reasonable defensive measure" analysis, and does not argue that the invocation of this analysis was a vast departure from the accepted and usual course of judicial proceedings. As such, there is no compelling reason to grant the Petition.

VI. THE FAA AND CASES INTERPRETING IT COMPEL THE CONCLUSION THAT THE CBA CLAUSE IS VALID.

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") also compels the conclusion that the clause at issue is valid. The FAA states in part that:

> A written provision in a . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. § 2.[2]

In *Circuit City*, this Court held that, based on the FAA, arbitration agreements with respect to employment contracts are generally enforceable. 532 U.S. at 114-15. Here, Petitioner was not even required to arbitrate any federal statutory or constitutional claims. She was permitted to pursue the same claims before the EEOC and in a lawsuit in the district court. To hold the clause invalid in this case would impose a barrier to agreed-upon

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[2] Connecticut law provides similarly. *See* Conn. Gen. Stat. § 52-408.

arbitration of state law claims, which would in turn violate the FAA. The law is settled in this regard and no contrary positions exist among the circuits, particularly in the wake of *Pyett*.

VII. THERE WAS NO MATERIALLY ADVERSE ACTION.

As discussed above, the contract clause at issue is not retaliatory, but rather an agreed upon election of forum provision. Petitioner cannot prove the elements of retaliation claim, particularly that she suffered any materially adverse action. In *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), this Court clarified that an "adverse employment action," as defined in the Title VII discrimination context, was not necessary to prove a claim of retaliation. Rather, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted).

Petitioner contends that the Union's dissuading act was the deprivation of an arbitration regarding her grievances. This is simply not true. On the contrary, the Petitioner has fully pursued all of her claims of discrimination. The incorporation by the *White* court of the reasonableness requirement dictates that where an employee's representative -- the Union here -- collectively bargains on behalf of the employee and agrees to such a provision, the collectively bargained-for provision cannot be

legitimately termed adverse. The *White* court also made clear that "material adversity [is required]...to separate significant from trivial harms." *Id.* Requiring the Petitioner, like all Union members, to select another forum and avoid duplicative proceedings is certainly not retaliatory. At worst, Petitioner was denied the ability to pursue duplicative state law claims in two fora. This would not have dissuaded a reasonable worker from filing a complaint of discrimination. The affect on the Petitioner can only be considered theoretical. It should be noted that nothing in the Agreement prohibited the Petitioner from filing a Charge of Discrimination with the EEOC based on a violation of federal discrimination law, from filing a lawsuit based on allegations of federally-barred discrimination or retaliation, or from assisting others in prosecution of any type of action, including with the CHRO. She also could have filed a claim with the CHRO after her arbitration.

Following *White*, both the Second and Seventh Circuits (as well as all other circuits) require a "materially adverse action" to state a retaliation claim under Title VII. *See Breneisen v. Motorola, Inc.*, 512 F.3d 972, 979 (7th Cir. 2008) (requiring materially adverse action to state a retaliation claim under Title VII, citing *White*); *Kessler v. Westchester County Dept. of Social Services*, 461 F.3d 199, 208 (2d Cir. 2006) (same). Because there was no materially adverse action here, there is no compelling reason to grant the Petition. Petitioner has not pointed to any cases holding that invocation of a election of forum clause similar to that in this case constitutes a materially adverse action.

CONCLUSION

For the reasons set forth above, this Court should deny the Petitioner's Petition.

Respectfully submitted,

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